Filed 12/11/08 Madden v. Super. Ct. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

VERNON MADDEN, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	No. B200652 (Los Angeles County Super. Ct. No. ZM007711)

ORIGINAL PROCEEDINGS in mandate. Marcelita Haynes, Judge. Petition denied in part and granted in part.

Jonathan Mandel for Petitioner.

No appearance for Respondent.

Steve Cooley, District Attorney, John K. Spillane, Chief Deputy District Attorney, Sharon J. Matsumoto, Assistant District Attorney, Roberta Schwartz and William Woods, Deputy District Attorneys, for Real Party in Interest.

INTRODUCTION

Petitioner Vernon Madden, the defendant in a pending Sexually Violent Predator (SVP) commitment proceeding under the Sexually Violent Predators Act (SVPA), Welfare and Institutions Code section 6600 et seq.,[1] seeks a peremptory writ of mandate or prohibition compelling the superior court to (1) set aside its order denying his motion for appointment of a DNA testing laboratory, and (2) enter a new order compelling appointment of such a laboratory. The SVPA petition alleged Madden had suffered two prior convictions for sexually violent offenses. After probable cause was found to hold Madden in custody for trial on the commitment petition, Madden sought appointment of a laboratory to conduct DNA testing of the "rape kits" collected from the victims in those two cases. Madden argued that DNA testing would lead to admissible evidence proving he either had not committed the crimes, or that he had not committed them in the fashion described by the victims. After a lengthy series of motions and hearings below, the superior court denied the motion. We conclude the superior court properly denied the motion for DNA testing as to one of the rape kits, but should have granted the motion in regard to the other. Accordingly, we grant the requested relief in part.

FACTUAL AND PROCEDURAL BACKGROUND

1. *SVPA petition and probable cause finding.*

a. *Predicate offenses.*

The People's SVPA petition alleged two predicate offenses: a 1996 conviction for committing a forcible lewd act upon a child, L.J. (the L.J. case) and a 2003 conviction for forcible oral copulation of a prostitute, C.N. (the C.N. case). In the L.J. case, the evidence showed that in October 1995, Madden, a dance producer, obtained permission to have L.J. dance at his studio late in the evening. He had her change into a swimsuit in his vehicle and coerced her into drinking beer, causing her to vomit. He then took her to his sister's house where he forcibly raped her. A medical examination conducted within

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[1] All further undesignated statutory references are to the Welfare and Institutions Code.

approximately six hours after the rape showed vaginal trauma consistent with rape. Two partial spermatozoa were recovered on vaginal slides taken during the examination. DNA testing was not performed, apparently because at that time it was not possible to test sperm fragments. Madden was convicted by a jury of committing a forcible lewd act upon a child (Pen. Code, § 288, subd. (b)). We affirmed Madden's conviction direct appeal, noting that evidence of his guilt was overwhelming. (*People v. Madden* (Sept. 25, 1997, B103180) [nonpub. opn.].)

In the C.N. case, Madden pleaded no contest to forcible oral copulation. (Pen. Code, § 288a, subd. (c)(2)). According to police reports, the victim, C.N., a prostitute, was working on Pacific Coast Highway when she was picked up by Madden. Madden told her he wanted her "to be his woman that night." She willingly entered his car and they visited several motels before finding a room. While Madden paid and registered, C.N. waited in his vehicle. Once inside, Madden removed his clothing and offered C.N. gin and cocaine. She declined. He told her to stop "sniveling" and slapped her. Frightened, she complied with his request to drink and smoke, while Madden watched. He then removed her clothing and performed various sex acts with her. The victim told police she was scared and wished to leave, but Madden threatened to punch her and throw her out the window, and punched her twice. He demanded oral copulation, which she performed several times. At Madden's request, C.N. bit his nipples. According to C.N., Madden ejaculated in her mouth and vagina during the evening. C.N. told police that Madden wore a condom "towards the end" of the incident. Madden eventually left the motel. The next morning C.N. and her father went to the motel manager. The father stated that "[s]omebody beat up my daughter." The motel manager gave police a copy of Madden's driver's license. C.N. told police she had not engaged in the sexual activities willingly. A sexual assault examination was conducted within several hours of the attack. It is unclear whether the sexual assault examination revealed the presence of semen in C.N.'s bodily orifices.

When interviewed by police, Madden admitted being at the motel with C.N. but denied assaulting C.N. or engaging in sexual activities with her. He told police C.N. had flagged him down on Pacific Coast Highway, he was concerned because she appeared to be in distress, and they rented the motel room. An officer observed bite marks on Madden's nipples.

Madden pleaded no contest to forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)). According to Madden's briefing, he had denied the charge and only pleaded no contest because he was offered a favorable plea deal, i.e., a six-month time-served offer.

b. *SVPA petition.*

In July 2004, presumably prior to the date when Madden was scheduled to be released from prison, the People petitioned for his commitment as a sexually violent predator. The petition alleged the aforementioned convictions as predicate offenses. After a hearing, the superior court found probable cause and ordered Madden held in custody pending the SVPA trial.

2. *DNA testing request.*

a. *Initial request.*

In March 2006, Madden's counsel filed an ex parte motion for appointment of a laboratory to conduct DNA testing on the rape kits gathered in the two predicate cases. Madden's counsel averred that in the L.J. case, a police report indicated the victim stated Madden had worn a condom during the rape. Madden's motion argued that L.J. had instigated their sexual encounter after telling him she had engaged in intercourse with other persons. If the sperm fragment found during the rape examination turned out to be from another donor, this fact would support his defense by "establishing that the alleged victim had consensual sex with another man," thereby "undercut[ting] the use of force."

As to the C.N. case, Madden averred that the victim was an admitted prostitute; that he had denied the charge and had requested a DNA test; but he had pleaded guilty when offered a favorable plea deal. His motion asserted that "Negative results would undercut the credibility of the accuser."

On March 30, 2006,[2] the Superior Court granted Madden's motion and signed an order appointing a DNA laboratory to assist the defense.

b. *Motion to quash.*

On May 31, 2006, the People moved to quash the appointment order.[3] The parties then embarked on a lengthy series of responses, counterresponses, and hearings, in which they made a variety of arguments, as follows.

The People initially assumed Madden's motion was brought pursuant to Penal Code section 1405, which provides that an incarcerated felon may, upon the requisite showing, move for DNA testing and/or appointment of counsel to bring a DNA testing motion, when the perpetrator's identity is a significant issue in the case. Madden responded that Penal Code section 1405 did not apply, because the statute only applied to persons who were currently incarcerated, not SVPA defendants.

Instead, he contended the relevant statute was section 6603, which provides that an SVPA defendant is entitled to the assistance of counsel, the right to retain experts, and the right to access to all relevant medical and psychological records and reports. Madden urged that an SVPA defendant has the right to challenge the People's evidence regarding how the prior crimes were committed. He averred that in a typical SVPA trial, the psychiatric experts who evaluate a defendant testify at length about the facts of the prior crimes. The People and their experts rely on those facts as evidence of a mental disorder and as evidence he is likely to engage in sexually violent, predatory criminal conduct if released. Thus, evidence showing his prior crimes were not committed by force would be relevant and admissible.

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[2] The order is dated March 30, 2005, but this appears to be a typographical error.

[3] The People initially moved to quash the order only as it pertained to the rape kit in the C.N. case, but subsequently amended the motion to quash to include a challenge to the L.J. case rape kit as well.

The People countered that section 6603 was not intended to be used to retry the predicate prior convictions or challenge the evidence in support thereof. The People noted that they did not seek to support the SVPA petition with the rape kit evidence, and the presence or absence of Madden's DNA would not reveal the violent nature of his conduct. By definition, the crimes of which Madden had been convicted showed force and violence. However, when asked by the trial court whether, at the SVP proceeding, a defendant could deny committing one of the predicate crimes, the People conceded that he would not be precluded from doing so and it would be up to the jury to "make that factual finding."

The superior court granted the People's motion to quash. The court stated that the DNA evidence might assist the defense, and found it "obvious" that at an SVPA trial, the experts place heavy reliance on the facts of the underlying cases to infer whether the defendant suffers from a present mental condition that would make him likely to reoffend. However, the court concluded that because the Legislature had required a high threshold showing when a felon seeks to obtain DNA testing under Penal Code section 1405, allowing DNA testing in Madden's SVPA case would circumvent Penal Code section 1405.

c. *Motion under Penal Code section 1405.*

Madden then moved for DNA testing under Penal Code section 1405. The People opposed the motion on the grounds that (1) Madden was not serving a term of imprisonment but was in custody on a civil commitment petition, and therefore Penal Code section 1405 did not apply to him; and (2) Madden had failed to make the prima facie showing required by Penal Code section 1405. The superior court denied Madden's motion on the grounds stated by the People. The court noted, "[i]t appears that the civil discovery act may allow for the appointment of an expert for testing of DNA for purposes of the SVPA. That issue, however, is not before this court."

d. *Second motion for appointment of DNA testing laboratory under SVPA.*

Undaunted, on April 10, 2007, Madden filed a new motion for appointment of a laboratory to conduct DNA testing, "based on the finding . . . that [Penal Code section] 1405 was not controlling in SVP cases." Madden essentially renewed the arguments made in response to the People's motion to quash, discussed *ante*. He additionally argued that he had a statutory and due process right to challenge the evidence, confront witnesses, and challenge the experts' assumptions about how the crimes were committed.

On May 22, 2007, the superior court denied the motion. The court noted that Madden "seeks to use his due process right to confrontation as a tool to gain information that would assist him in attacking the validity of the predicate offenses by challenging the credibility of his victims." Relying on precedent applicable to the proof of prior convictions in the enhancement context, the court concluded that in an SVPA trial the trier of fact could look to the entire record of the prior conviction, but no further, when determining whether a defendant had been convicted of qualifying predicate offenses. The court opined, "[t]he parties may not relitigate the facts behind the record of the defendant's previous convictions." DNA evidence could not show any sexual contact Madden had with his victims was consensual rather than forced; instead, DNA evidence was relevant only to the question of whether Madden was the perpetrator. That issue had already been resolved adversely to Madden by the jury in the L.J. case, and by Madden's no contest plea in the C.N. case. Madden was therefore collaterally estopped from arguing or relitigating an issue of ultimate fact that had already been decided against him. Somewhat contradictorily, the court added that Madden could challenge his prior convictions and contest the truth of the matters admitted in his plea or explain any justification he might have had for entering the plea.

e. *Purported "renewal" of motion after denial.*

Undeterred, on June 26, 2007, Madden's counsel filed a document styled as an "ex parte response" to the court's ruling, which reiterated much of the material contained in his earlier motions. Although the record before us does not reflect it, we are advised by

counsel that the trial court reviewed the "ex parte response" and briefly heard oral argument on the matter, but again denied the request.

3. *The instant writ petition.*

Madden next filed the instant writ petition, seeking a writ of prohibition or mandate directing the superior court to vacate and set aside the final two orders denying his request for appointment of a DNA testing laboratory, and to enter a new order making the requested appointment. We issued an order to show cause why the relief should not be granted as to the C.N. case only.

Echoing the arguments made during the proceedings below, Madden urges that in an SVPA action, the People typically rely on the facts surrounding the predicate crimes to prove the defendant is an SVP; DNA evidence would be potentially relevant to impeach the victim's version of what happened and bolster Madden's credibility; and he has a due process right to challenge the People's evidence and confront the witnesses against him. He asserts that his "request for DNA testing in the instant case is statutorily and constitutionally mandated, not to disprove the fact of the predicate priors' existence, but to prove they were not sexually violent [or] predatory and that [he] does not have a current mental disorder."

The People, on the other hand, contend the DNA testing request was correctly denied because Madden's motion did not comply with the requirements of amended Penal Code section 1405. They contend Madden cannot establish that identity was a significant issue in the case, nor can he show a reasonable probability that he would have received a more favorable verdict or sentence had DNA testing been available at the time of his conviction.

DISCUSSION

1. *Applicable legal principles: the SVPA and discovery in an SVPA proceeding.*

The SVPA provides for the involuntary civil commitment of sex offenders following completion of their prison terms, if they are found to be sexually violent predators. (*People v. Allen* (2008) 44 Cal.4th 843, 857; *People v. Roberge* (2003) 29 Cal.4th 979, 984; *People v. Calderon* (2004) 124 Cal.App.4th 80, 87; *Turner v. Superior*

Court (2003) 105 Cal.App.4th 1046, 1054.) At the time the People's commitment petition was filed, proof that a person was a sexually violent predator required a threshold showing that the person had been convicted of certain enumerated sexually violent offenses against two or more victims (the predicate offenses).[4] (*People v. Lopez* (2006) 146 Cal.App.4th 1263, 1271.) At the time the SVPA petition was filed, the civil commitment term was two years, which could be renewed if there was no improvement in the defendant's mental condition. (*People v. Roberge*, *supra*, at p. 984.) After passage of Jessica's law, the commitment is for an indeterminate term. (§ 6604; *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1281.)

As relevant here, to establish a defendant is a sexually violent predator, the People must prove: "(1) defendant was convicted of two separate sexually violent offenses; (2) he had a diagnosable mental disorder that made him a danger to the health or safety [of] others; (3) his disorder makes it likely he will engage in sexually violent criminal conduct if released; and (4) his sexually violent criminal conduct will be predatory in nature." (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 52, italics omitted; *People v. Otto* (2001) 26 Cal.4th 200, 205; *People v. Hurtado* (2002) 28 Cal.4th 1179, 1181-1182.) A sexually violent offense is defined as enumerated offenses "when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person," that resulted in a conviction or finding of not guilty by reason of insanity. (§ 6600, subd. (b).) Sexually violent criminal behavior is predatory if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization. (§ 6600, subd. (e); *People v. Hurtado*, *supra*, at p. 1182.)

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[4] Proposition 83, Jessica's Law, effective November 8, 2006, amended the SVPA to require sexually violent offenses against only one victim. (*People v. Carlin* (2007) 150 Cal.App.4th 322, 328.)

An SVPA commitment proceeding is a "special proceeding of a civil nature" rather than a criminal action. (*People v. Yartz* (2005) 37 Cal.4th 529, 532; *People v. Allen, supra,* 44 Cal.4th at p. 860 ["Proceedings to commit an individual as a sexually violent predator in order to protect the public are civil in nature"]; *People v. Dixon* (2007) 148 Cal.App.4th 414, 442; *Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677, 1685; *Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 735.) The Act's purpose is not punitive. (*People v. Yartz, supra,* at p. 535.)

"Because a person may be confined, the Act provides certain safeguards normally associated with criminal actions, including appointed counsel if indigent, proof beyond a reasonable doubt, the right to a jury trial, and a unanimous verdict if there is a jury. [Citations.] Unlike in criminal cases, however, the right to a jury trial is statutory, not constitutional. [Citations.] Further, there is no 'guarantee against compulsory self-incrimination' under the Fifth Amendment [citation], and the state may call the [defendant] as a witness [citation]." (*Murillo v. Superior Court, supra,* 143 Cal.App.4th at p. 735.) However, " '[b]ecause civil commitment involves a significant deprivation of liberty, a defendant in an SVP proceeding is entitled to due process protections.' " (*People v. Allen, supra,* 44 Cal.4th at pp. 861-862; *People v. Dixon, supra,* 148 Cal.App.4th at p. 442.)

The Civil Discovery Act applies to SVPA proceedings. (*People v. Yartz, supra,* 37 Cal.4th at pp. 537, fn. 4; *People v. Dixon, supra,* 148 Cal.App.4th at pp. 420, 442.) Under the Civil Discovery Act, a party may obtain discovery of any unprivileged matter "that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action." (Code Civ. Proc., § 2017.010; *People v. Dixon, supra,* at p. 442; *People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 987.) Information is relevant or reasonably calculated to lead to the discovery of admissible evidence if it might reasonably assist a party in evaluating the case, preparing for trial, or

facilitating settlement, or if it might reasonably lead to other evidence that would be admissible. (2 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ ¶ 8:66, 8:67, pp. 8C-1- 8C-2.)

Section 6603 of the SVPA provides in pertinent part, "A person subject to this article shall be entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf." (§ 6603, subd. (a).)

At the time Madden moved for appointment of a DNA testing laboratory, and at the time his writ petition was filed, the SVPA was silent regarding the issue of DNA testing. Effective January 2008, however, section 6603, subdivision (a) was amended to address the subject. Language added to section 6603, subdivision (a) now provides: "Any right that may exist under this section to request DNA testing on prior cases shall be made in conformity with Section 1405 of the Penal Code." Additionally, new subdivision (h) provides, "Nothing in this section shall limit any legal or equitable right that a person may have to request DNA testing." (Stats. 2007, ch. 208, § 1.)

Where an offense can be committed in a fashion that does not necessarily involve force, violence, or duress, the People may go beyond the elements of the prior crime and rely on the facts of the prior case to prove the offense qualifies as sexually violent. (See *People v. Fulcher, supra,* 136 Cal.App.4th at pp. 50-51 [allowing new, outside-the-record testimony of victim to prove offense had involved substantial sexual contact]; *People v. Carlin, supra,* 150 Cal.App.4th at p. 339; *People v. Whitney* (2005) 129 Cal.App.4th 1287, 1296.) Further, evidence regarding whether and how the defendant committed the predicate offense(s) is highly relevant to proof of the other elements, i.e., whether the defendant suffers from a diagnosable mental disorder that makes him a danger to the health or safety of others, whether his disorder makes it likely he will engage in sexually

violent criminal conduct if released, and whether that conduct will be predatory. (See *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1175 [noting that prior sexually violent offenses are used to help establish the defendant suffers from a current mental disorder and is likely to commit violent sex crimes in the future]; *People v. Otto, supra,* 26 Cal.4th at p. 210 ["the hearsay at issue . . . permeates not only the substantial sexual conduct component of the prior crime determination, but also the psychological experts' 'conclusion that [Otto] was and remained a pedophile . . . likely to reoffend' "].)

Accordingly, the SVPA expressly provides that the details and circumstances surrounding the predicate crimes may be introduced at the SVPA proceeding.[5] Section 6600, subdivision (a)(3) provides in pertinent part, "[c]onviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health." Indeed, the details of the predicate crimes may be proved by multiple level hearsay, if the hearsay bears special indicia of reliability. (*People v. Otto, supra,* 26 Cal.4th at pp. 206-208, 210; *People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, 140; *People v. Fraser* (2006) 138 Cal.App.4th 1430, 1443-1444.)

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[5] Courts have sometimes observed that predicate offenses play a " 'limited role' " in an SVPA determination. (*People v. Otto, supra,* 26 Cal.4th at p. 205; *People v. Carmony* (2002) 99 Cal.App.4th 317, 325.) These statements appear to be aimed at the fact that the existence of a predicate offense alone is insufficient to prove the defendant is an SVP; evidence of a currently diagnosed mental disorder making the defendant a danger is also required.

2. *Standard of review.*

We review a discovery order for abuse of discretion. (*People v. Superior Court (Cheek), supra,* 94 Cal.App.4th at p. 987.) "Thus, where there is a basis for the trial court's ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court." (*Ibid.*) Writ review of a discovery order is appropriate where necessary to address questions of first impression and general importance. (*Ibid.*)

3. *Testing of the rape kit is unwarranted in the L.J. case.*

Applying these principles here, we conclude the superior court properly denied Madden's request for appointment of a laboratory to perform DNA testing of the rape kit in the L.J. case. Madden seeks DNA testing in of the rape kit primarily to show L.J. consented to intercourse, in hopes of attacking her credibility at the SVPA commitment proceeding. Apart from the question of whether any right to DNA testing complies with Penal Code section 1405, Madden fails to show the relevance of the requested testing.

First, the requested DNA evidence is not relevant to disprove the first element in the SVPA proceeding, i.e., that Madden has been convicted of a sexually violent offense. Madden was convicted of committing a forcible lewd act on L.J. By definition the crime involved force and qualifies as a sexually violent offense. (§ 6600, subd. (b).) The plain language of section 6600, subdivision (a) requires proof that Madden *suffered the conviction, not that he committed the conduct.* Therefore, where the crimes by definition are sexually violent, evidence of the facts and circumstances surrounding them are irrelevant to this element. Madden cannot attempt to disprove the first element by showing the acts were consensual.

Second, Madden was convicted by a jury, and principles of collateral estoppel preclude him from attempting to relitigate the question of force. "Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962) 58 Cal.2d 601, 604 (*Teitelbaum)*; *People v. Carmony, supra,* 99 Cal.App.4th at p. 322; *People v. Scott* (2000) 85 Cal.App.4th 905, 916.) "[I]n a subsequent civil case, a final judgment of conviction in a prior criminal case conclusively bars relitigation of

any issue necessarily decided in the criminal case . . . ." (*20th Century Ins. Co. v. Schurtz* (2001) 92 Cal.App.4th 1188, 1193; *Teitelbaum, supra,* 58 Cal.2d at p. 607 ["any issue necessarily decided in a prior criminal proceeding is conclusively determined as to the parties if it is involved in a subsequent civil action"]; *McCutchen v. City of Montclair* (1999) 73 Cal.App.4th 1138, 1144 ["Federal and state courts have consistently held that the doctrine of collateral estoppel may preclude relitigation in a civil suit of issues that were decided in a prior criminal proceeding"]; *Yarbrough v. Superior Court* (1985) 39 Cal.3d 197, 205 [where defendant was convicted of second degree murder in criminal action, collateral estoppel would preclude relitigation of his state of mind and the theory of accidental killing in subsequent civil wrongful death action brought against defendant]; but see *Gutierrez v. Superior Court* (1994) 24 Cal.App.4th 153, 169-170.) "Collateral estoppel applies to successive criminal trials." (*Teitelbaum, supra,* 58 Cal.2d at p. 606.) Collateral estoppel principles have been held to apply in SVPA proceedings, at least insofar as a prior determination in an SVPA action that a defendant has suffered the requisite prior convictions is preclusive in a subsequent SVPA recommitment action. (*People v. Lopez, supra,* 146 Cal.App.4th at p. 1273; cf. *Turner v. Superior Court, supra,* 105 Cal.App.4th at p. 1059 [jury determination that an individual was not an SVP at a particular point in time precluded relitigation of that issue at a subsequent SVPA proceeding].) Application of the collateral estoppel doctrine is not automatic; the California Supreme Court has "repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting." (*Lucido v. Superior Court, supra,* at pp. 342-343.)

Collateral estoppel applies where: (1) the issue is identical to that decided in the former proceeding; (2) the issue was actually litigated and necessarily decided; (3) the decision in the former proceeding is final and on the merits; and (4) the party against whom preclusion is sought is the same as, or in privity with, the party to the former proceeding. (*Lucido v. Superior Court, supra,* 51 Cal.3d at p. 341.)

Here, these requirements were met. Whether Madden committed forcible rape is identical to the issue decided in the first proceeding. The issue was actually litigated and necessarily decided by the jury's verdict;[6] the decision is final and was on the merits; and Madden was the defendant in the prior proceeding. Further, the policies underlying the collateral estoppel doctrine -- preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants (see *Gutierrez v. Superior Court, supra,* 24 Cal.App.4th at p. 158), are furthered by application of the doctrine here. Madden has already had a full criminal trial on the question of whether the offense was consensual, and thus relitigation of that issue is unnecessary to a fair adversary proceeding in the SVPA action. By specifying that hearsay may be used to prove the details underlying the predicate offenses in an SVPA proceeding, "the Legislature apparently intended to relieve victims of the burden and trauma of testifying about the details of the crimes underlying the prior convictions. Moreover, since the SVP proceeding may occur years after the predicate offense or offenses, the Legislature may have also been responding to a concern that victims and other percipient witnesses would no longer be available." (*People v. Otto, supra,* 26 Cal. 4th at p. 208; *People v. Carlin, supra,* 150 Cal.App.4th at p. 335.) Allowing relitigation of the ultimate fact of the predicate crime would not further these goals.

Third, even assuming the collateral estoppel doctrine does not preclude Madden from relitigating the question of force, he has failed to establish that the requested testing would provide relevant evidence or lead to the discovery of relevant evidence. Madden averred that the victim told police he wore a condom during the rape, but a rape examination showed the presence of two partial spermatozoa in her vaginal tract. Madden sought to show that, since he wore a condom, the sperm must have come from someone other than him. Such evidence, he urged, would support his theory that the

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[6] The information and verdict form specified Madden had committed a forcible lewd act, not specifically rape. However, it appears that the only lewd act at issue was rape.

victim instigated sex with him after telling him she had engaged in intercourse with other persons. Even if testing showed the sperm belonged to someone else, this would at best provide tenuous and weak evidence that the victim consented to intercourse with Madden. Even if the victim had engaged in consensual intercourse with another person, that fact would have had no probative value on the question of her interaction with Madden. The trial court properly denied the request for appointment of a DNA laboratory in the L.J. case.

4. *The Superior Court abused its discretion by denying the request for appointment of a laboratory to conduct DNA testing of the rape kit in the C.N. case.*

a. *DNA testing could provide relevant, exculpatory evidence.*

We reach the opposite conclusion in regard to DNA testing of the rape kit in the C.N. case, however. As with the L.J. case, DNA evidence could not be relevant, or lead to admissible evidence, in regard to the first SVPA element, i.e., that Madden was convicted of a sexually violent offense. The first element requires proof the defendant suffered the conviction, not that he engaged in the charged conduct. By definition, forcible oral copulation involves the use of force and qualifies as a sexually violent offense within the meaning of section 6600, subdivision (b). A conviction based on a no contest plea is sufficiently reliable to serve as a predicate prior in an SVPA commitment proceeding. (*People v. Yartz, supra,* 37 Cal.4th at p. 532.)

However, DNA testing could potentially provide admissible evidence relevant to the other SVP elements, i.e., that Madden has a diagnosed mental disorder making him a danger to others because he is likely to engage in sexually violent predatory conduct. The police report recounts that C.N. stated Madden ejaculated in her mouth and vagina. The absence of his DNA in those orifices could obviously provide significant exculpatory evidence and corroborate Madden's account that he did not have sexual contact with the victim. Semen evidence has "obvious exculpatory potential" in a sexual assault case. (*Thomas v. Goldsmith* (9th Cir. 1992) 979 F.2d 746, 750, fn. 2.) Although Madden's version of events may not be particularly believable, the matter is in the discovery stages. Especially given that the victim was working as a prostitute and that the People made a

time-served offer, favorable DNA results could tend to exculpate Madden. Indeed, the People acknowledge that to prove the elements necessary to obtain an SVPA commitment, they often rely at the SVPA trial upon experts who testify based on their review of institutional records, as well as police and probation records describing the facts of the underlying offense.

b. *No collateral estoppel bar.*

Because Madden pleaded no contest in the C.N. case, principles of collateral estoppel do not preclude him from attempting to show he did not commit forcible oral copulation against C.N. The legal effect of a plea of nolo contendere to a felony is the same as that of a plea of guilty for all purposes. (4 Witkin, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 260, pp. 468-469.) A plea of guilty admits every element of the offense charged. (*Id.* at § 259, p. 467.) However, while a no contest or guilty plea to a felony is admissible as *evidence* in a subsequent civil action (*Rusheen v. Drews* (2002) 99 Cal.App.4th 279, 284), "a conviction based on a guilty plea is not collateral estoppel on the issue of guilt in a subsequent criminal case." (4 *Witkin*, Cal. Criminal Law, *supra*, § 259, p. 468.) "The plea is not conclusive evidence; it is merely evidence against the party and the party may contest the truth of the matters admitted by his plea and explain why he entered the plea." (*Rusheen v. Drews*, *supra*, at p. 284.)

The reason for this distinction has been explained thusly: "It would not serve the policy underlying collateral estoppel . . . to make [a guilty] plea conclusive. 'The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy.' [Citation.] 'This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case.' [Citation.] When a plea of guilty has been entered in the prior action, no issues have been 'drawn into controversy' by a 'full presentation' of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice [citation] combine to prohibit the application of collateral estoppel against a party who, having

pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action." (*Teitelbaum, supra,* 58 Cal.2d at pp. 605-606; see also *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 395; cf. *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1204, fn. 3.)

An SVPA proceeding, of course, is not a criminal action; instead it is a special proceeding of a civil nature. (*People v. Yartz, supra*, 37 Cal.4th at p. 532.) However, application of the rule that a no contest plea does not have preclusive effect is appropriate here. In *Yartz*, the California Supreme Court considered whether a conviction based on a nolo contendere plea could serve as a predicate prior in an SVPA commitment action. In finding that it could, *Yartz* reasoned that "in the SVPA context, a conviction based on a defendant's nolo contendere plea does not undermine the determination of a defendant's suitability for civil commitment. For instance, requisite convictions alone 'shall not be the sole basis for the determination' that a person is an SVP. [Citation.] A person alleged to be an SVP 'shall be entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports.' [Citation.] If the person demands a jury trial, a unanimous verdict is required. [Citation.] The trier of fact 'shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.' [Citation.] Thus, we conclude the SVPA provides sufficient safeguards to ensure that a defendant's conviction from a nolo contendere plea is reliable as evidence of the defendant's current mental disorder and future violent sexual behavior." (*Id.* at p. 542.) If a no contest plea had preclusive effect on the question of whether the defendant committed the conduct in question, these safeguards would be undermined.

c. *The People's argument: DNA testing under Penal Code section 1405.*

Thus, we turn to the question of whether the 2007 amendment to section 6603, subdivision (a), retroactively supports the superior court's denial of the motion for appointment of a DNA testing laboratory. As noted, the amended version of section 6603

provides, "Any right that may exist under this section to request DNA testing on prior cases shall be made in conformity with Section 1405 of the Penal Code."

Penal Code section 1405 provides, in pertinent part, "A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing." (§ 1405, subd. (a).)[7] To

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[7] Penal Code section 1405 provides: "(a) A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing. [¶] (b) (1) An indigent convicted person may request appointment of counsel to prepare a motion under this section by sending a written request to the court. . . . [¶] (c) (1) The motion shall be verified by the convicted person under penalty of perjury and shall do all of the following: [¶] (A) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case. [¶] (B) Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction. [¶] (C) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought. [¶] (D) Reveal the results of any DNA or other biological testing that was conducted previously by either the prosecution or defense, if known. [¶] (E) State whether any motion for testing under this section previously has been filed and the results of that motion, if known. [¶] (2) Notice of the motion shall be served on the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested. Responses, if any, shall be filed within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause. [¶] (d) If the court finds evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, it shall order the party at whose request the testing was conducted to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing. [¶] (e) The court, in its discretion, may order a hearing on the motion. The motion shall be heard by the judge who conducted the trial, or accepted the convicted person's plea of guilty or nolo contendere, unless the presiding judge determines that judge is unavailable. . . . [¶] (f) The court shall grant the motion for DNA testing if it determines all of the following have been established: [¶] (1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion. [¶] (2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted,

obtain DNA testing under section 1405, the defendant must verify the motion under penalty of perjury and must (1) explain why the identity of the perpetrator was, or should have been, a significant issue in the case; (2) explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the defendant's verdict or sentence would be more favorable if the DNA test results had been available at the

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tampered with, replaced or altered in any material aspect. [¶] (3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case. [¶] (4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence. [¶] (5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at trial. [¶] (6) The evidence sought to be tested meets either of the following conditions: [¶] (A) The evidence was not tested previously. [¶] (B) The evidence was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results. [¶] (7) The testing requested employs a method generally accepted within the relevant scientific community. [¶] (8) The motion is not made solely for the purpose of delay. [¶] (g)(1) If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used. [¶] . . . [¶] (h) The result of any testing ordered under this section shall be fully disclosed to the person filing the motion, the district attorney, and the Attorney General. If requested by any party, the court shall order production of the underlying laboratory data and notes. [¶] (i)(1) The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person. [¶] . . . [¶] (j) An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. . . . [¶] . . . [¶] (m) Notwithstanding any other provision of law, the right to file a motion for postconviction DNA testing provided by this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendere."

time of conviction; (3) make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought; (4) reveal the results of any DNA or other biological testing that was conducted previously by either the prosecution or defense, if known; and (5) state whether a previous motion for testing was filed and the results of that motion. The motion must be served on the Attorney General, the district attorney in the county of conviction, and the governmental agency or laboratory holding the evidence.

"Section 1405, subdivision (f) directs the trial court to grant the motion for DNA testing if eight conditions are met." (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1046.) The motion shall be granted if: (1) the evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion; (2) the evidence has been kept with a sufficient chain of custody; (3) "[t]he identity of the perpetrator of the crime was, or should have been, a significant issue in the case"; (4) the defendant has made a prima facie showing that the evidence sought to be tested is material to the issue of his identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation at issue; (5) test results would raise a reasonable probability that, in light of all the evidence, the verdict or sentence would have been more favorable had the test results been available; (6) the evidence was not previously tested or current testing would provide better data; (7) the testing method is generally accepted within the scientific community; and (8) the motion is not made for purposes of delay. The cost of DNA testing "shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay." (Pen. Code, § 1405, subd. (i)(1).)

Our Supreme Court has recently shed light on the fourth and fifth factors. As to the materiality requirement, the court analogized to the familiar standard for reviewing *Pitchess*[8] motions and concluded that the movant must show DNA testing would be

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[8] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

relevant to the issue of identity, rather than dispositive of it. (*Richardson v. Superior Court, supra,* 43 Cal.4th at p. 1049.) "That is, the defendant is not required to show a favorable test would conclusively establish his or her innocence. It would be sufficient for the defendant to show that the identity of the perpetrator of, or accomplice to, the crime was a controverted issue as to which the results of DNA testing would be relevant evidence." (*Ibid.*) The low standard applies because "the materiality requirement in section 1405, subdivision (f)(4) relates to the discovery of evidence." (*Richardson v. Superior Court, supra,* at p. 1049.)

The court concluded the " 'reasonable probability' " requirement means a probability sufficient to undermine confidence in the outcome. (*Richardson v. Superior Court, supra,* 43 Cal.4th at p. 1050.) "[T]he defendant must demonstrate that, had the DNA testing been available, in light of all of the evidence, there is a reasonable probability – that is, a reasonable chance and not merely an abstract possibility – that the defendant would have obtained a more favorable result." (*Id.* at p. 1051.)

The legislative history makes clear the amendment to the SVPA had two purposes. First, the Legislature intended to ensure SVPA defendants have access to DNA testing, even though they are no longer in prison custody. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 542 (2007-2008 Reg. Sess.) as amended Apr. 9, 2007.) As the committee report explained, prior to the amendment "the law regarding sexually violent predators (SVPs) post-conviction requests for DNA testing is unclear. This is because SVPs are civilly committed and therefore not considered incarcerated so Penal [Code] section 1405 does not apply to them." (*Ibid.*) "[A] problem arises when a person subject to the SVP Act wants to challenge the sufficiency of DNA evidence from his or her prior cases because SPVs are not 'serving a term of imprisonment' . . . . Because there is no clear statutory process for SVPs to have access to this type of testing, it is unclear whether a defendant has a right to an ex-parte order for DNA testing which would give access to testing with no notice to the district attorney. [¶] This bill clearly allows SVPs to have access to DNA testing under the procedures set forth in Penal Code Section 1405

but at the same time preserves any other legal or equitable rights they may currently have to request DNA testing."

Second, the amendment sought to ensure SVPA defendants would generally follow the requirements set forth by Penal Code section 1405 as a prerequisite to DNA testing. "SVP's are subject to section 6603 of the Welfare and Institutions Code which allows them to get ex parte requests for biological material without providing notice or an opportunity to be heard to the People. This bill will close this loophole by specifying that requests for post-conviction DNA testing made by sexually violent predators comply with the requirements and procedures of Penal Code Section 1405." (Sen. Com. on Public Safety, *supra*, Analysis of Sen. Bill No. 542, as amended Apr. 9, 2007, pp. 1-2; see also Assem. Com. on Public Safety, Analysis of Sen. Bill 542, July 3, 2007.) An uncodified statement of Legislative intent states, "The Legislature does not intend to create any new right to DNA testing on prior cases. It is the intent of the Legislature to provide for a procedure for DNA testing in the event Section 6603 of the Welfare and Institutions Code is construed to provide a right to DNA testing on prior cases." (Stats. 2007, ch. 208, § 2, p. 2055-2057, West's Cal. Legislative Service (2007 – 2008 Reg. Sess.) In short, the amendment sought to ensure SVPA defendants have the right to DNA testing, but must follow the requirements of Penal Code section 1405 in order to obtain such testing.

(i) *Application here.*

The People urge that, in light of the amendment to section 6603, Madden's only avenue for DNA testing was through Penal Code section 1405, and his motion failed to comply with the requirements of that statute. Madden asserts that the amendment does not apply to him because the statute was amended after his motion was made and his writ was filed.

First, it is questionable whether the amendment can reasonably be applied here, given that it was not in effect when the trial court denied the motion or when Madden filed the instant writ petition. Such application is problematic in that at the time Madden brought the motion and the court ruled, section 6603 did not require Madden to comply

with Penal Code section 1405. Indeed, the People had argued and the trial court had suggested, in regard to an earlier motion, that Penal Code section 1405 was *inapplicable* because Madden was no longer in prison.[9] It therefore seems anomalous to judge the adequacy of Madden's motion by reference to a standard that did not apply at the time.

Assuming arguendo Penal Code section 1405 applies, the People are correct that neither Madden's most recent motion, nor his earlier motion filed pursuant to Penal Code section 1405, met the statute's requirements. Among other things, neither motion was verified by Madden under penalty of perjury; neither adequately explained why the identity of the perpetrator was or should have been a significant issue; neither motion established that the evidence was available and in a condition that would permit the DNA testing requested; and neither identified the specific type of DNA testing sought.

Further, the People argue that Madden cannot meet Penal Code section 1405's requirement that a motion for testing shall be granted only if "identity of the perpetrator of the crime was, or should have been, a significant issue in the case." (§ 1405, subd. (f)(3).) The People urge that identity was not an issue in the C.N. case. Madden did not challenge that he was with C.N. in a hotel room, and his driver's license was found at the front desk of the motel. Thus, the People posit, there is no real issue that Madden was the perpetrator.

If, for purposes of Penal Code section 1405, identity is a significant issue only when the defense is misidentification, the People are clearly correct that Madden cannot meet the statute's requirement. However, arguably this interpretation is too narrow on the facts of this case. Where the defense is misidentification, DNA testing has obvious relevance to determine the source of the semen or biological material on the victim.

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9 The trial court stated Madden's motion under Penal Code section 1405 was "puzzling" and observed that Madden was no longer in custody but was a civil detainee. It stated that Penal Code section 1405 was not meant to be a civil discovery device, but was intended to exonerate defendants who have been wrongfully committed. Despite these statements, the trial court also ruled that Madden could refile his Penal Code section 1405 petition if he complied with Penal Code section 1405's requirements.

Where the defense is that no sexual contact occurred between the defendant and the victim, identity may be at issue to the extent the defendant contends that he was not the source of any semen found during the medical examination.

d. *DNA testing as a due process right.*

We need not decide whether Madden's identity is at issue within the meaning of the statute, however. Assuming that Penal Code section 1405 applies, that Madden has not met its procedural and notice requirements, and that he cannot show identity was at issue, he is not necessarily precluded from obtaining testing of the rape kit in the C.N. case. Subdivision (h) of amended section 6603 provides, "Nothing in this section shall limit any legal or equitable right that a person may have to request DNA testing." It has been recognized that a defendant has a limited due process right to biological samples for the purpose of DNA testing. (*Richardson v. Superior Court, supra,* 43 Cal.4th at p. 1051 [citing *Osborne v. Dist Atty's Office for Third Judicial* (9th Cir. 2008) 521 F.3d 1118, 1132.) As noted *ante,* "[b]ecause civil commitment involves a significant deprivation of liberty, a defendant in an SVP proceeding is entitled to due process protections." (*People v. Otto, supra,* 26 Cal.4th at p. 209; *People v. Allen, supra,* 44 Cal.4th at p. 861.)

" ' "Once it is determined that [the guarantee of] due process applies, the question remains what process is due." [Citation.]' " (*People v. Allen, supra,* 44 Cal.4th at p. 862.) Due process in an SVPA proceeding " 'is not measured by the rights accorded a defendant in criminal proceedings, but by the standard applicable to civil proceedings' " and requires only that the procedure adopted comport with fundamental principles of fairness and decency. (*People v. Fulcher, supra,* 136 Cal.App.4th at p. 55.) Our Supreme Court has identified four relevant factors in determining what process is due in an SVPA proceeding: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of

the action and in enabling them to present their side of the story before a responsible government official." (*People v. Otto, supra,* 26 Cal.4th 200, 210; *People v. Allen, supra,* at pp. 862-863.)

Here, the first, third, and fourth factors favor appointment of a DNA testing laboratory. First, the private interests that will be affected are "the significant limitations on [petitioner's] liberty, the stigma of being classified as an SVP, and subjection to unwanted treatment." (*People v. Otto, supra,* 26 Cal.4th at p. 210; *People v. Allen, supra,* 44 Cal.4th at p. 863.) These interests are obviously substantial, and weigh heavily in support of the requested discovery.

The function of an SVPA proceeding is to protect the public from dangerous and mentally ill sexually violent predators (*People v. Otto, supra*, 26 Cal.4th at p. 214; *People v. Allen, supra,* 44 Cal.4th at p. 866 [the government has a strong interest in protecting the public from sexually violent predators and providing treatment to such predators].) The overriding interest in an SVPA proceeding is obviously an accurate determination of whether the defendant is, in fact, a sexually violent predator. DNA testing could potentially provide exculpatory or inculpatory evidence relevant to such an accurate determination. Other than the cost of the testing,[10] there appears to be no burden on the People. (Contrast *People v. Otto, supra,* at pp. 214-215 [requiring live testimony, rather than hearsay, at SVPA proceedings would potentially impede the statute's purpose].) If the evidence benefits the defendant, the People may elect to present additional evidence to rebut it. (See generally *People v. Allen, supra,* at p. 868 [the "added burden on the prosecution of responding to a credible defense most certainly is not a legitimate reason to preclude the defendant from testifying" at an SVPA proceeding].) Thus, the third factor suggests DNA testing is appropriate.

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[10] The trial court's initial order appointing the DNA laboratory placed a $3,400 cap on the testing.

As to the fourth factor, Madden avers he did not commit sexual offenses against C.N. and, as we have noted, DNA evidence could potentially support this defense. Thus, allowing the testing would assist him in presenting his side of the story.

Application of the second factor, i.e., whether the denial of DNA testing would risk an erroneous finding Madden is an SVP, is less clear. (See *People v. Allen, supra,* 44 Cal.4th at p. 863.) " 'Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists'. . . . Thus, if these [factual issues resolved in the commitment proceeding] are unreliable, a significant portion of the foundation of the resulting SVP finding is suspect." (*People v. Otto, supra,* 26 Cal.4th at pp. 210-211.) In other words, the question whether Madden *actually* committed forcible sexual offenses against C.N. in the fashion she described is important to the accurate determination of whether he is an SVP. Madden pleaded no contest to forcible oral copulation and, in so doing, presumably admitted a factual basis for his plea. (See *People v. Otto*, *supra*, at p. 211.) His story to police – that he picked C.N. up and spent time with her in a motel room without any sexual contact – is not particularly believable, and was contradicted by the bite marks observed on him by police. On the other hand, C.N.'s version of the incident – that she, while working as a prostitute, voluntarily accompanied Madden to the motel room but did not consent to the sexual activities – may not necessarily prove persuasive to a jury. The fact Madden was apparently given a six-month time-served offer may indicate the weakness of the inculpatory evidence.

As a matter of due process, an SVPA defendant may challenge the reliability of the People's evidence. *People v. Superior Court (Howard), supra,* 70 Cal.App.4th at p. 140, for example, reasoned that the admission of hearsay in SVPA proceedings does not violate a defendant's due process rights because "the proceedings mandated by [the SVPA] are adequate to enable a defendant to challenge the People's documentary

evidence. By doing so, the defendant has the opportunity to thoroughly present his side of the story . . . [T]he defendant may rebut the hearsay statements by providing his own version of the details underlying his offenses." (*Id.* at pp. 154-155; *People v. Fraser, supra,* 138 Cal.App.4th at p. 1455.) Allowing Madden to test the rape kit would provide him a meaningful opportunity to challenge the People's evidence, and cannot but enhance the reliability of the outcome of the proceeding. Because this matter is in the discovery stages, it is unknown whether the DNA evidence will be helpful or damaging to Madden's case. However, given that the matter is in the discovery stages, the minimal burden on the People in allowing the DNA testing, and the fact the DNA testing could potentially provide forensic evidence relevant to the issues at trial, we believe the balance of the factors gives Madden a due process right to conduct DNA testing on the rape kit in the C.N. case. As our Supreme Court recently pointed out in the context of assessing a Penal Code section 1405 motion, "it is important for the trial court to bear in mind that the question before it is whether the defendant is entitled to develop potentially exculpatory evidence and not whether he or she is entitled to some form of ultimate relief such as the granting of a petition for habeas corpus based on that evidence. As the Ninth Circuit [has] observed . . . 'Obtaining post-conviction access to evidence is not habeas relief.' [Citation.] Therefore a trial court should not decide whether, assuming a DNA test result favorable to the defendant, that evidence in and of itself would ultimately require some form of relief from the conviction." (*People v. Richardson, supra,* 43 Cal.4th at p. 1051.)

DISPOSITION

The petition is denied insofar as it seeks appointment of a laboratory to conduct DNA testing of the rape kit in Case No. LA22943. The petition is granted insofar as it seeks the superior court to appoint a laboratory to conduct DNA testing of the rape kit in Case No. NA057621.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.